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CHARLES ELMORE

No. 514.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

D. B. HEINER, Collector of Internal Revenue,
Appellant,

v.

JOHN H. DONNAN, *et al.*, Executors and Trustees of the Estate of John W. Donnan,
Appellee.

ON CERTIFICATE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF.

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE.*

The undersigned respectfully moves the Court for leave to file the accompanying brief in this case as *amicus curiae.*

This application is made as counsel for the Estate of Percy R. Pyne, deceased, late of Somerset County, New Jersey. The Federal estate tax return for the above named estate, filed pursuant to law, disclosed transfers within two years of his death of property valued at more than $4,500,000.00. Although not admitted or shown to have been made in contemplation of death, the transfers have been included

in the taxable estate by the Commissioner of Internal Revenue at the value of the property on the date of the decedent's death, pursuant to the provisions of the second sentence of Section 302 (c) of the Revenue Act of 1926, and the Commissioner proposes to assess and collect a tax thereon in an amount in excess of $700,000.00. The Estate of Percy R. Pyne, therefore, has a vital interest in the questions now before the Court, relating to the validity of the second sentence of Section 302 (c).

WHEREFORE, leave to file the accompanying brief is respectfully requested.

WAYNE JOHNSON,
Counsel for the Estate of Percy R. Pyne.

No. 514.

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Appellant,

v.

JOHN H. DONNAN, *et al.*, Executors and Trustees of the Estate of JOHN W. DONNAN,

Appellee.

ON CERTIFICATE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF *AMICUS CURIAE*.

The United States Circuit Court of Appeals for the Third Circuit on November 11, 1931, certified to this Court the following questions:

1. Does the second sentence of Section 302 (c) of the Revenue Act of 1926 violate the due process clause of the Fifth Amendment to the Constitution of the United States?

2. If the answer to the first question be in the negative, is the second sentence of Section 302 (c) of the Revenue Act of 1926 void because repugnant to Sections 1111, 1113 (a), 1117 and 1122 (c) of the same Act?

The Statute.

Act of Congress approved February 26, 1926, Chapter 27 (44 Stat. 9):

Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated— * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

Sec. 1111. Section 3220 of the Revised Statutes, as amended, is amended to read as follows:

"Sec. 3220. Except as otherwise provided in sections 284 and 319 of the Revenue Act of 1926 the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court for any internal-revenue taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section."

Sec. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary

of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

Section 1117. Section 177 of the Judicial Code, as amended, is amended to read as follows:

"Sec. 177. (a) No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except as provided in subdivision (b).

"(b) In any judgment of any court rendered after the enactment of the Revenue Act of 1926 (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any internal-revenue tax erroneously or illegally assessed or collected, or for any penalty collected without authority or for any sum which was excessive or in any manner wrongfully collected, under the internal-revenue laws, interest shall be allowed at the rate of 6 per centum per annum upon the amount of such tax, penalty, or sum, from the date of the payment or collection thereof to the date of entry of such judgment or, if

such judgment is reviewed by an appellate court, to the date of entry of final judgment."

Section 1122. * * *

(c) The paragraph added by Section 1310 of the Revenue Act of 1921 at the end of paragraph Twentieth of Section 24 of the Judicial Code, relating to the jurisdiction of district courts, as amended, is re-enacted without change, as follows:

> "Concurrent with the Court of Claims, of any suit or proceeding, commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected, under the internal-revenue laws, even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced."

POINTS.

1. The statutory provision in question purporting to impose an estate tax on gifts not in fact made in contemplation of death is so arbitrary and capricious as to amount to confiscation and deprives the taxpayer of rights guaranteed by the Fifth Amendment of the Constitution.

2. This Court has held that a similar provision in a State statute violates the Fourteenth Amendment, from

which it follows that the statute here in question is invalid under the Fifth Amendment.

3. The rights guaranteed by the Fifth Amendment of the Constitution are superior to the supposed necessity for this legislation.

4. The statutory provision in question cannot be sustained as a tax on gifts *inter vivos*.

5. There is complete unanimity of opinion in the decisions of the lower courts that the enactment in question is unconstitutional.

6. Furthermore, the second sentence of Section 302 (c) is void because repugnant to subsequent provisions of the same Act.

ARGUMENT.

POINT I.

The statutory provision in question purporting to impose an estate tax on gifts not in fact made in contemplation of death is so arbitrary and capricious as to amount to confiscation and deprives the taxpayer of rights guaranteed by the Fifth Amendment of the Constitution.

The challenged enactment plainly undertakes to raise a conclusive presumption that gifts were made in contemplation of death when made within two years of death and after the enactment of the Act, if the value exceeds $5,000.00, regardless of whether they were in fact made in

contemplation of death. It requires the inclusion of the value of the gifts at the time of the death of the donor in the net estate which is subject to the transfer tax imposed. The statute disregards facts and ignores the actual intent or motive of the donor in making the gift. It admits of no proof contrary to the conclusive presumption which it seeks to raise.

With respect to gifts made more than two years prior to death, or gifts made within two years of death but prior to the enactment of the 1926 Act, proof is permitted to establish that the gifts were not made in contemplation of death and thus avoid the tax. Even with respect to gifts made within the two year period, proof is permitted to establish that gifts were not made in contemplation of death, if their value at the date of death does not exceed $5,000; but if their value exceeds that sum, the law attempts to apply a conclusive presumption and excludes all proof of the real facts.

Thus, gifts made under the same circumstances and admittedly not made in contemplation of death may fall into different classifications for estate tax purposes, solely because in one case the donor chances to die within two years after the transfer, and in another case the donor survives that period, or because one is made prior to the enactment of the law and the other is made thereafter, though both are within two years of death, or because one is valued at $5,000 or less at the date of death of the decedent and the other is valued at more than that sum.

If like gifts are made on successive days there is no difference in law between them, yet under the statute one such gift may be taxable, whereas the other is exempt. There is no basis for any legal distinction between a gift of $5,000

and a gift of $5,001, if we assume that both gifts are made under the same circumstances, but again the statute may operate to classify one such gift as subject to taxation and the other as exempt. Thereby, it makes a distinction where there is no difference. Such a classification of subjects of taxation is arbitrary, capricious and discriminatory.

No question is here raised as to the power of Congress to tax gifts actually made in contemplation of death, nor can any such question properly be raised in view of this Court's decision in *Milliken* v. *United States*, 283 U. S. 15. The inclusion of that type of gift in the taxable estate was there upheld as a permissible classification of a proper subject of taxation to secure equality of taxation and to prevent evasion of estate taxes. However, to justify the imposition of such a tax the necessary basis of fact must exist. The Congress can make the law apply to the facts but it cannot make the facts to which the law is to apply. When the Congress undertakes to engraft upon a simple gift *inter vivos* the legal import of a gift made in contemplation of death it is giving to the gift the legal import of a fact essentially different in nature, and when Congress uses this method to apply a transfer tax on testamentary dispositions to gifts without testamentary character it goes beyond the congressional power.

Schlesinger v. *Wisconsin Tax Commission*, 270 U. S. 230;
Nichols v. *Coolidge*, 274 U. S. 531, 542.

Under the doctrine in *Milliken* v. *United States, supra*, the donee of a gift actually made in contemplation of death may be considered as taking the gift subject to the excise tax, but this principle cannot be applied to the donee of a

bona fide gift *inter vivos*. He takes the property as and for his own without any restrictions or limitations and when Congress attempts to create a legal fiction that such a gift is a testamentary disposition if the donor chances to die within two years and then to subject it as such to the estate tax, it goes beyond its constitutional powers in much the same way as it did in the Revenue Act of 1924, by which it attempted to apply the gift tax provisions to gifts completed prior to the enactment of the law. This Court denied the power of the Congress to tax such gifts. *Blodgett* v. *Holden*, 275 U. S. 142; *Untermyer* v. *Anderson*, 276 U. S. 440. The point was stressed as the basis of the Court's decisions that the nature and amount of the tax burden imposed could not have been understood and foreseen by the taxpayer at the time of the particular voluntary act which was made the occasion of the tax. While here the law does not attempt to apply the tax to transactions which were completed prior to its enactment, the effect is much the same because the event which gives rise to the tax is the death of the donor within an arbitrary time after the gift, a circumstance which neither the donor nor the donee contemplated at the time of the gift. The tax is not based on the circumstances under which the gift was made but upon the accidental happening of an event having no relation to the gift. This event—death—was not in contemplation of the parties at the time the gift was consummated and hence the nature and amount of the tax burden, or indeed whether there would be any tax, could not have been foreseen or understood at the time of the gift. Until the death of the donor or the expiration of two years no one could tell the amount of the tax, or whether there would be any tax at all.

After attempting to close the door to proof of the real facts and endeavoring to give to simple gifts the legal import of testamentary gifts, the enactment in question purports to subject the value of the gifts at the death of the donor to a transfer tax which cannot be applied to all gifts or indeed to any gift without testamentary character. This is not a tax, but a confiscation of the property without due process of law in violation of the Fifth Amendment.

It is conceivable that an individual might from motives entirely apart from anticipation of death transfer substantially all of his property by way of gift so that at the time of his death, within two years, no property would be left in his estate to satisfy the purported tax. In such event the donee under Section 315 (b) of the statute would become personally liable for the tax and the property received by him would be subject to a lien. A somewhat similar situation was before this Court in *Levy* v. *Wardell*, 258 U. S. 542. In that case Henriette Levy had transferred in 1902 and 1903 certain shares of stock to her three children. The transfers were not made in contemplation of death. The donor died September 15, 1916. She left no property or estate whatever and consequently there was no estate to administer. The Commissioner of Internal Revenue, assuming to act under the provisions of the Act of Congress of September 8, 1916, assessed an estate tax of $12,460.84 on the value of the transfers made and threatened to force payment of the same. The donees paid the tax and sued to recover it back. This Court, following *Schwab* v. *Doyle*, 258 U. S. 529, held that the Act of September 8, 1916, should not be construed to have retroactive effect, but also said that if it were so construed it was in violation of the Constitution of the United States and that it would take the property of the plaintiffs without due process of law, in

violation of the Fifth Amendment, and would not be a transfer tax or an indirect tax, but would be a direct tax on the property of the donees in violation of Article 1, Section 9, subdivision 4 of the Constitution, because not laid in proper relation to the census or enumeration as therein provided. That view of the statute there under consideration applies with equal force to the statute here involved.

POINT II.

This court has held that a similar provision in a State statute violates the Fourteenth Amendment, from which it follows that the statute here in question is invalid under the Fifth Amendment.

This court has already decided that a conclusive statutory presumption that all gifts of a material part of a decedent's estate made by him within six years of his death were made in contemplation of death, whereby they became subjected, without regard to his actual intent in making the gifts, to graduated inheritance taxes, creates an arbitrary classification, and conflicts with the Fourteenth Amendment of the Constitution. *Schlesinger* v. *Wisconsin Tax Commission, supra.* This decision is conclusive as to the first question certified, unless it can be distinguished on the ground that the period of time embracing the gifts to which the State sought to apply the presumption was six years, whereas the Federal statute provides for a two-year period, or on the ground that the decision involved a State statute, whereas the case at bar involves a Federal statute.

The language of the majority opinion, however, indicates clearly that the period of time was unimportant. The court cited two reasons for its decision, first, the statutory

classification by which gifts *inter vivos*, within six years of death but in fact made without contemplation thereof, were conclusively presumed to have been so made, while like gifts at other times are not thus treated, and second, the gifts were subject to graduated taxes which could not be properly imposed on all gifts or indeed upon any gift without testamentary character. It is plain that the classification would be no less arbitrary if the time had been two years instead of six years. It is likewise apparent that the duration of the period fixed by the statute had no bearing upon the court's second objection to the statute, that is, that gifts not made in contemplation of death are subjected to taxes which could not properly be imposed upon all gifts or upon any gift without testamentary character.

That was the view adopted by the Court of Appeals of Kentucky in a case involving a similar statute attempting to raise a conclusive presumption with respect to gifts within three years of death. After citing this court's decision in the *Schlesinger* case, the court said that the Kentucky statute must be held unconstitutional on the authority of that case. *State Tax Commission* v. *Robinson, Executor, et al.*, 28 S. W. (2d) 491 (Court of Appeals of Kentucky).

There is no basis for distinguishing the *Schlesinger* case on the ground of substantial difference between the Fourteenth and the Fifth Amendments. The purpose of the Fourteenth Amendment, as stated by this court, is to extend to citizens and residents of the States the same protection against arbitrary State legislation affecting life, liberty and property as is afforded by the Fifth Amendment against similar legislation by Congress. *Tonawanda* v. *Lyon*, 181 U. S. 389, 391. In other cases this court has held

that the Fifth Amendment imposes the same restrictions on the Federal Government that the Fourteenth Amendment places on the States. *Shaffer* v. *Carter*, 252 U. S. 537, 544; *Coolidge* v. *Long*, 252 U. S. 582, 595. The contention that the *Schlesinger* case was distinguishable on this ground was considered by the District and Circuit Courts in cases involving the statute here under consideration and was rejected. *Donnan* v. *Heiner*, 48 Fed. (2d) 1058; *Anderson* v. *Guinzburg* (C. C. A. 2), decided December 7, 1931, to be reported 54 Fed. (2d) 629; see also *American Surety & Trust Co.* v. *Commissioner*, 24 B. T. A. 334.

POINT III.

The rights guaranteed by the Fifth Amendment of the Constitution are superior to the supposed necessity for this legislation.

The second sentence of Section 302 (c) can only be justified, if at all, as a necessary adjunct to the power of Congress to tax gifts in contemplation of death as testamentary dispositions in order to prevent evasion of the tax. But a *bona fide* gift *inter vivos* is not an evasion of the tax and there is no necessity for including such gifts in the classification of testamentary dispositions. Under the regulations made pursuant to law the return of the taxable estate must disclose all transfers other than those made for adequate consideration. The law imposes the duty upon the Commissioner of examining the return and of making such inquiry as may be necessary to enable him to make a determination of the tax liability. When the Commissioner has made his final determination, the burden is then imposed upon the taxpayer, if he petitions the Board of Tax Ap-

peals for a redetermination or resorts to the Courts for recovery of the tax paid, to establish that the determination of the Commissioner is incorrect. If the taxpayer is able by a preponderance of evidence to rebut the *prima facie* presumption of correctness which attaches to the final determination of the Commissioner, there is no justification for denying him the opportunity. It may well be said that issues involving intent and motive are sometimes difficult of ascertainment and proof, but that is no reason for denying the taxpayer his day in court. The difficulty falls upon the taxpayer. The Commissioner has the advantage in that he can make a determination in the matter to which the law attaches a presumption of correctness which can only be overcome by affirmative evidence to the contrary. Of course, such a provision as that here in question simplifies administration of the law, but however desirable it may be to make a tax law self-executing or as nearly so as possible, Congress must stay within constitutional limits. In imposing a tax upon the transfer of property of a decedent, it cannot by a legislative fiat which prohibits inquiry into the real facts bring into the permissible classification transfers which were not in fact testamentary in character. The rights guaranteed to the citizens of this country under the Fifth Amendment are superior to the supposed necessity for such an arbitrary and discriminatory classification. *Schlesinger* v. *Wisconsin Tax Commission, supra; Hoeper* v. *Wisconsin Tax Commission,* 52 S. Ct. 120.

POINT IV.

The statutory provision in question cannot be sustained as a tax on gifts *inter vivos*.

The title of the Revenue Act of 1926, of which the challenged enactment is a part, imposes an estate tax as distinguished from an individual inheritance tax, that is, the tax is imposed on the net estate as an entity and not on the individual shares passing to the beneficiaries. The tax as thus imposed is an excise tax levied upon the transfer of the net estate as defined in the statute. Obviously it is not a gift tax. Under the statute a transfer within the taxable class is to be included in the estate at the value at the date of death, irrespective of the value at the time of the gift. The amount of the tax is not based on the gift itself but on the value of the entire net estate. The tax falls on the interest of the beneficiaries of the estate and not upon the donee, unless the estate is inadequate. This statute will not support a tax as imposed on gifts *inter vivos* only and there is no possible justification for upholding the second sentence of Section 302 (c) as a gift tax.

POINT V.

There is complete unanimity of opinion in the decisions of the lower courts that the enactment in question is unconstitutional.

The first question before the court has been answered in the affirmative by the United States Circuit Court of Appeals for the First and Second Circuits, each of which affirmed decisions of the United States District Courts to

the same effect. In addition to the decision of the court below in the case at bar, the United States District Court for the District of Delaware has likewise held that the second sentence of Section 302 (c) of the Revenue Act of 1926 is unconstitutional and the United States Board of Tax Appeals has reached the same conclusion. In all of the cases thus far arisen, in which the validity of the enactment in question was put in issue, the courts and Board of Tax Appeals reached the unanimous conclusion that the provision is beyond the power of Congress and violates the rights guaranteed to citizens in the Fifth Amendment to the Constitution. *Hall* v. *White,* 53 Fed. (2d) 210 (C. C. A. 1), affirming 48 Fed. (2d) 1060; *Anderson* v. *Harold K. Guinzburg, et al., Executors, supra; Delaware Trust Company* v. *Handy* (D. C. Del.), 51 Fed. (2d) 867, certified to Supreme Court December 3, 1931, Docket No. 546; *American Surety and Trust Co.* v. *Commissioner, supra; Cromwell, et al., Executors* v. *Commissioner,* 24 B. T. A. 461; *Littauer, et al., Executors* v. *Commissioner,* 24 B. T. A. 983.

POINT VI.

Furthermore, the second sentence of Section 302 (c) is void because repugnant to subsequent provisions of the same Act.

Sections 1111, 1113 (a), 1117 and 1122 (c), considered as a whole, provide for a complete system of corrective justice whereby after payment a taxpayer may institute suit and recover taxes illegally collected from him. This system gives a taxpayer his day in court and affords him an opportunity to show that taxes paid by him were illegal

and unlawfully assessed and collected. It gives him the right to a judicial determination of the facts necessary and material to the tax liability. Section 1113 (a), which is a re-enactment of Section 3226, Revised Statutes, does not provide for any exception to the taxpayer's right to a final judicial determination. It is the plain intent of that section that a taxpayer may have his right to recover taxes, which he claims were illegally collected, determined by the judicial department, irrespective of any prior administrative or legislative determination, provided he complies with the prerequisites to institution of his action, such as filing a timely claim for refund and bringing suit within the prescribed time.

Prior to the Revenue Act of 1926, the taxpayer's right to have a judicial determination of a tax controversy involving transfers in contemplation of death was safeguarded by the provisions of the applicable Revenue Laws. These provisions were substantially similar to the first and third sentences of Section 302 (c) of the Revenue Act of 1926. The first sentence provides for inclusion in the taxable estate of gifts made at any time if they were actually made in contemplation of death. The third sentence provides in substance that a transfer made within two years of death without adequate consideration, but prior to the enactment of the Act shall, *unless shown to the contrary,* be deemed to have been made in contemplation of death. The second sentence, however, creates a conclusive presumption with respect to similar transfers made after the enactment of the Act without opportunity to the taxpayer *to show the contrary.* It is a new provision in estate tax legislation and goes far beyond all prior laws. It purports to deny to the taxpayer a fair opportunity to prove the

facts upon which the estate tax liability is predicated and thereby it is repugnant to the subsequent provisions of the statute, under which for over half a century there has been a complete system of corrective justice under which a taxpayer is assured of his day in court. The purpose of the second sentence of Section 302 (c) is just the opposite of Section 1113 (a). The former cannot be reconciled with the latter. If it is impossible to reconcile two provisions enacted at the same time, the last in order of arrangement should prevail. It follows, therefore, that the second sentence of Section 302 (c) is invalid because repugnant to the subsequent provisions of the same Act.

Conclusion.

For the reasons set forth above it is submitted that the first question certified should be answered in the affirmative. If the Court holds otherwise, the second question should be answered in the affirmative.

Respectfully submitted,

WAYNE JOHNSON,
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February, 1932.